

(1996) 03 AHC CK 0031

Allahabad High Court

Case No: Special Appeal No. 954 of 1995

Waf Alalaulad and another

APPELLANT

Vs

M/s. Sundardas Daulatram and
sons and others

RESPONDENT

Date of Decision: March 13, 1996

Acts Referred:

- Constitution of India, 1950 - Article 21, 226, 300A, 32, 38
- Specific Relief Act, 1963 - Section 6

Citation: AIR 1996 All 355

Hon'ble Judges: R.A. Sharma, J; B.S. Chauchan, J

Bench: Division Bench

Advocate: N.N. Singh, for the Appellant; S.C. and R.P. Goel, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

R. A. Sharma, J.

On May 26. 1950, Waqf Alalaulad through its Mutwalli therein-after referred to as the owner) executed a lease deed of its property therein after referred to as the property) in favour of Sri Om Prakash Gupta for the purposes of running a cinema house. The said lease was for a period of 45 years with effect from 1-1-1950 with a stipulation for its renewal for a further period of 15 years. Period of the lease expired on 31-12-1994. The owner took possession of the property after mid-night of 31st December, 1994. Being aggrieved, M/s. Sundardas Daulatram and sons and M/s. Imperial Theatres thereafter referred to as the tenants) filed a writ petition on March 6, 1995 before this Court for the following reliefs:

"(a) Issue a writ, order or direction in the nature of mandamus commanding the respondents 1 and 2 to force the respondents 3, 4 and 5 to restore back possession of the premises in dispute to the petitioners.

(b) Issue a writ, order or direction in the nature of mandamus commanding the respondents 1 and 2 to maintain law and order at least providing the protection of law to the petitioners whereby they may enjoy and exercise their legal rights and fundamental rights and the same may not be violated by taking law in their own hands by respondents 3, 4 and 5 or anybody else.

(c) Issue a writ, order or direction in the nature of mandamus commanding the respondent No. 1 not to refuse the renewal of the licence of the petitioner on account of the incident, which had taken place in the mid-night of 31st December, 1994 and 1st January 1995 referred to in the writ petition.

(d) Issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

(e) Issue an order awarding costs."

On 7-3-1995 learned Single Judge passed the following interim order issuing interim mandamus to the District Magistrate and Senior Superintendent of Police, Bareilly to look into the matter and to restore the possession of the property to the petitioners if the allegations made by them are found to be correct.

"In this petition the allegation is that the petitioners were forcibly dispossessed by the respondents through local Mafia. This allegation is serious because nobody can be dispossessed except by following the procedure of law. Hence on the facts and circumstances I issue an interim mandamus to the D.M., Bareilly and S. S. P. Bareilly to look into the matter and if the allegations of the petitioners that they were forcibly and illegally dispossessed, are correct, they should restore possession to the petitioners forthwith or show cause within two weeks."

In pursuance of the above order the District Magistrate constituted a committee consisting of Sub-Divisional Magistrate, Sadar, Bareilly and Assistant Superintendent of Police, Bareilly. to make enquiry. The said committee submitted the report dated 20-3-1995 before the District Magistrate, which was filed before the learned Judge. On 27-11-1995 the learned Judge passed the following order:

"Heard Shri R. P. Goyal and Shri S. K. Garg, learned counsel for the petitioners and Shri H. N. Singh, learned Counsel for the respondents Nos. 3, 4 and 5 and Shri Vineet Saran for Shri A. K. Vishnoi. the then District Magistrate and Shri Gurbachan Lal, the then Senior Superintendent of Police.

In view of the affidavits of District Magistrate and the Senior Superintendent of Police, it is evident that the respondent Nos. 4 and 5 had taken forcible possession of the premises in question instead of taking proceedings. Hence, this forcible possession is clearly illegal and I confirm the interim mandamus dated 7-3-95 and direct the respondent Nos. 4 and 5 to hand over possession back to the petitioner within two weeks from today. The respondent Nos. 1 and 2 will ensure that this order is complied with. However, it is open to the respondent Nos. 4 and 5 to take

such legal proceedings such as civil suit or other proceedings as they may be advised."

Being aggrieved by it the owner and its mutwalli have filed this appeal. The Division Bench on 8-12-1995 passed an interim order directing for the maintenance of status quo and adjourned the case for 11-12-1995. On 11-12-1995 after hearing the learned counsel for both the parties the Division Bench was of the opinion that the appeal should be listed for final hearing along with the writ petition in which interim order, against which the appeal has been filed, was passed. The Bench further directed that two other writ petitions involving the controversy relating to the house grabbing, should also be listed along with the appeal. Hon"ble the Chief Justice directed these cases to be listed before our Bench, Other petitions which were to be listed along with instant appeal have been delinked because in one of them controversy is not the same and the other is not ready for hearing. We have, therefore, to decide the Special Appeal along with the writ petition in which the order impugned in the appeal was passed.

2. We have heard the learned counsel for the parties. We have also heard Sri S. P. Gupta, Senior Advocate and Sri Rakesh Dwivedi: Additional, Advocate General who, at our request, have addressed the Court on the question relating to the jurisdiction of this Court under Article 226 of the Constitution to entertain a writ petition challenging grabbing of the property forcibly by unlawful means.

3. The contention of the learned counsel for the tenants is that the property of which they were in lawful possession has been unlawfully grabbed by the owner with the help of Mafias and it is the duty of the Court to restore its possession to them, Learned Counsel for the owner, apart from disputing the above contention, has raised the following preliminary objections :

(i) This Court under Article 226 of the Constitution of India can neither issue writ of mandamus to private individual for protection and enforcement of the contractual/legal rights of the private party, nor can it interfere in such matter even if the tenants have been unlawfully dispossessed from the property;

(ii) Tenants have alternative remedy of suit u/s 6 of the Specific Relief Act; and

(iii) Petitioners have no legal rights to remain in possession of the property after 31-12-1994 and as such writ of mandamus cannot be issued.

4. As regards the order impugned in the Special Appeal the learned counsel for the owner has contended that the learned Single Judge has no jurisdiction to grant, by way of interim order, the relief which could have been granted only at the stage of final hearing of the writ petition.

5. Before deciding the controversy on merits it is necessary to deal with the preliminary objections at the threshold.

6. In [M/s. Shantistar Builders Vs. Narayan Khimalal Totame and others](#), the Supreme Court has held that a "reasonable residence" for a man being a "necessity for fulfilling constitutional goal in the matter of development of man", is included in "life" in Article 21 of the Constitution. In [Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.](#), the Supreme Court has reiterated that the right to shelter is one of the rights covered under Article 21 of the Constitution. A person, therefore, cannot be deprived of and be dispossessed from his house/residence except according to the procedure established by law. Although right to shelter/residence is fundamental right covered under Article 21 of the Constitution, but the right to property has ceased to be a fundamental right. But in view of Article 300-A of the Constitution no person can be deprived of his property" save by authority of law". It is not open to any person to take forcible possession of any property by throwing out the person in possession. In [Krishna Ram Mahale \(Dead\), by his Lrs. Vs. Mrs. Shobha Venkat Rao](#), the Supreme Court in this connection has laid down as under at page 2100 :

"It is well settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. If any authority were needed for that proposition, we could refer to the decision of Division Bench of this Court in [Lallu Yeshwant Singh Vs. Rao Jagdish Singh and Others](#), . This Court in that judgment cited with approval the well known passage from the leading Privy Council case of Midnapur Zamindary Co. Ltd. v. Naresh Narayan Rao, 51 Ind App 293 at p. 299 : AIR 1924 PC 144 where it has been observed (p. 208) (of SCR): (at p. 622 of AIR):

"In India persons are not permitted to take forcible possession: they must obtain such possession as they are entitled to through a Court".

7. If a person has been dispossessed from immovable property without his consent otherwise than in course of law, he has a right to file a suit to recover its possession. Section 6 of the Specific Relief Act specifically provides for such a suit to recover the possession of the property. In such a case writ petition is not an appropriate remedy, because of various reasons, one of which is that this Court under Article 226 of the Constitution cannot issue writ of mandamus to private individual, unless he acted in exercise of statutory power and/or was discharging public duty. In Qamaruddin v. Rasul Baksh, 1990 AWC 308 Supreme Court, in this connection, has laid down as under :

"A writ of mandamus cannot be issued to a private individual unless he is under a statutory duty to perform a public duty. The dispute involved in the instant case was entirely between two private parties, which could not be a subject-matter of writ of mandamus under Article 226 of the Constitution."

Following the above decision a Full Bench of this Court in [Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others](#), has reiterated the same principle when it observed as follows :

"The opinion expressed by the Supreme Court in Qamaruddin's case (supra) to the extent that a writ of mandamus cannot be issued to a private individual unless he is under statutory duty to perform a duty is in accord with well established principles regarding writ of certiorari and mandamus and need no reiteration or elaboration at our hand."

In [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others](#), , relevant extract from which is reproduced below. Supreme Court has laid down that a writ of mandamus cannot be issued if the rights are purely of private character and/or person or authority whose order is challenged is purely private body with no public duty :

"If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus."

Therefore, if a person has been unlawfully dispossessed from his property without any re- course to law by a private person, no writ can be issued to restore the possession of that property to the person who has been dispossessed from it. The only remedy in such a case is a civil suit.

8. But dispossessing a person from his property otherwise than in due course of law is different from grabbing the property by terrorising the person in possession. To capture the property forcibly by creating terror by applying brute force is not a simple case of dispossessing a person from property. In a country governed by rule of law no person can be deprived of his, life, liberty and property by third degree methods, such as terrorising and man-handling the person concerned. In such a case not only the person who has been dispossessed of his property but the society itself is taken to ransom by brute force. Such an act creates terror in the minds of the people and has the effect of shaking the social fabrics of the society. These acts also hit and damage the authority of the Government with the result that the public order, peace and tranquility of the society are disturbed. In such cases it is the duty of the Government to come to the rescue of the persons who are threatened or have been dispossessed from their property by brazen act of law- lessness.

9. In [Charan Lal Sahu Vs. Union of India](#), , generally known as "Bhopal Gas leak disaster case" the Supreme Court while dealing with the concept known as "parens patrias", has held that the Government has the sovereign power of guardianship over the persons under disability and it is its duty to protect them. It was further held that where the citizens are not in a position to protect their rights the Government must intervene and fight for their rights. Relevant" extract from the above decision of the Supreme Court is reproduced below at page 1504 :

"There is a concept known both in this country and abroad, called "parens patriae". Dr. B. K. Mukherjee in his "Hindu Law of Religious-and Charitable Trusts," Tagore Law Lectures, Fifth Edition, at p. 454, referring to the concept of parens patriae, has noted that in English Law. the Crown as parens patriae is the constitutional protector of all property subject to charitable trusts such trusts being essentially matters of public concern. Thus the position is that according to Indian concept parens patriae doctrine recognised King as the protector of all citizens and as parent. In *Budhkaran Chaukhani v. Thakur Prosad Shah* AIR 1942 Cal 311 the position was explained by the Calcutta High Court at page 318 of the report. The same position was reiterated by the said High Court in [Banku Behary Mondal Vs. Banku Behary Hazra and Another](#), of the report. The position was further elaborated and explained by the Madras High Court in [Medai Dalavoi T. Kumaraswami Mudaliar Vs. Medai Dalavoi Rajammal](#), of the report. This Court also recognised the concept of parens patriae relying on the observations of Dr. K. Mukherjee aforesaid in [Ram Saroop Dasji Vs. S.P. Sahi, Special Officer-in-charge of The Hindu Religious Trusts and Others](#), . In the -words and phrases" permanent Edition. Vol. 33 at p. 99, it is stated that parens patriae is the inherent power and authority of a Legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words "parens patriae" meaning thereby "the father of the country", were applied originally to the King and are used to designate the state referring to its sovereign power of guardianship over persons under disability. (Emphasis supplied). Parens patriae jurisdiction, it has been explained, is the right of sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term "parens patriae" differs from country to country, for instance, in England it is the King, in America, it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and take into custody the rights and the privileges of its citizens when discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. The preamble to the Constitution, read with the Directive Principles. Arts. 38, 39 and 39A enjoins the State to take up the responsibility. It is the protective measure to which the social welfare State is committed. It is necessary for the State to ensure the fundamental rights in conjunction with the Directive Principle of State Policy to effectively discharge its obligation and for this purpose, if necessary, to deprive some rights and privileges of the individual victims or their heirs to protect their rights better and secure these further."

The position of the Government being that of parent it has to act, intervene and protect lives, liberty and property of the people when threatened or invaded. Its duty is much greater in the case of a person under disability. A person is under

disability not only when he suffers from physical or legal infirmities, but also when he is unable to stand up and protect his right and property from invasion by or with the help of anti social elements, Mafias and terrorists. In such a case it is not only duty of the Government to protect a person in distress and restore the possession of his property to him, but it is also the duty of this Court, when approached, to pass appropriate orders and issue necessary directions to the Government to protect his life, liberty and property and, when found necessary, to restore him the possession of his property.

10. A learned Single Judge of this Court in *Jai Prakash Vashisht v. Addl. District Magistrate*, 1995(26) All LR 46 has, in this connection, laid down as under:

"Illegal house grabbing seems to be rapidly becoming the order of the day in many places in Uttar Pradesh. This Court will be failing in its duty if it does not voice its protest against these brazen acts of lawlessness. A man's house is said to be his castle. But when the castle is invaded illegally by a mob of anti social elements who beat up the inhabitants, throw them out and illegally occupy the same, it is the matter of great concern for all law abiding citizens. Several instances of such illegal house grabbing have lately come to the notice of this Court, and reports about them have been published widely by the newspapers."

We respectfully agree with the learned Judge.

11. In [National Human Rights Commission Vs. State of Arunachal Pradesh and Another](#), a public interest petition under Article 32 of the Constitution was filed before Supreme Court in order to protect and enforce the rights under Article 21 of the Constitution of Chak matribals by preventing their eviction from the State of Arunachal Pradesh. Supreme Court while granting necessary relief, has laid down as under :--

"We are a country governed by the Rule of law. Our Constitution confers certain rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit any body or group of persons e.g. the AAPSU to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons, it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well being of Chakmas residing in the State without being inhibited by local politics." Supreme Court accordingly directed the State of Arunachal Pradesh to ensure that life and personal liberty of

every Chakma residing within the State is protected and any attempt to forcibly evict or drag them out of the State by organisations or group of persons shall be repelled, if necessary by requisitioning service of para-military or police force. It was further directed that the Chakmas will not be denied domestic life and comfort therein.

12. When a person, who has been dispossessed from his property by brazen acts of lawlessness by or with the help of anti-social elements, approaches this Court under Article 226 of the Constitution, this Court does not exercise its power to enforce the contractual and legal obligations of the parties. It only directs the Government to enforce the Rule of law and to protect the lives, liberty and the properties of the people and, if found necessary, to restore the possession of the property to the person who has been dispossessed therefrom, leaving it open to the parties to get their rights adjudicated through Civil Court. To tell a person whose property has been forcibly captured and seized by or with the help of anti social elements, to file a suit for its recovery and be on the street till the suit is decided by the last Court, is nothing but slapping a person in distress. The first two preliminary objections raised by the learned counsel for the owner are, therefore, rejected. .

13. As regards the third preliminary objection it may be mentioned that Supreme Court in [Krishna Ram Mahale \(Dead\), by his Lrs. Vs. Mrs. Shobha Venkat Rao](#) , relevant extract from which has been reproduced before, has held that no person can forcibly be dispossessed from property even by the owner except by recourse to law. If a person is sought to be dispossessed by brute force he has a right to approach this Court, to protect his possession and it is the duty of this Court to issue appropriate order, direction or writ in the nature of mandamus to the Government to protect the possession of the property of such a person till he is dispossessed therefrom through a Court. In the instant case period of lease expired on 31-12-1994. But the tenants have a right to continue in its possession till they are evicted through Court. They thus have the right to approach the Court to protect their possession of the property. Their writ petition as such cannot be said to be not maintainable. The third preliminary objection is also rejected.

14. As regards the merit of the case it may be mentioned that the Committee, appointed by the District Magistrate in pursuance of the interim order dated 7-3-1995 of this Court, has stated in its report that the tenants have not been dispossessed of the property by or with the help of Mafias and its possession was given to the owner by Sri Suresh Kumar Yadav who was the Manager of the tenants. It has further been mentioned in the said report that although Sri Yadav handed over the possession of the property willingly to the owner but no such power was given to him by his employers (tenants). It is thus clear that the possession of the property was given to the owner willingly by Sri Suresh Kumar Yadav, who was Manager and agent of the tenants. If Sri Yadav has, by handing over possession of the property to the owners, acted beyond the authority given to him by his employer, it is the matter between him and his employer and it cannot be said to be

a case of property grabbing. In this connection it may also be mentioned that in para 6 of the supplementary rejoinder-- affidavit -- I filed by the tenants it has been stated that even before the expiry of terms of their lease on 31-12-1994, a new lease deed regarding the property has been executed on 12-12-1994 between the owner and Smt. Neelam Yadav, wife of Sri Suresh Kumar Yadav, Manager of the tenants. This further strengthens the case of the owner that it is not the case of property grabbing. Therefore, if tenants have any grievance in this matter, they have to approach Civil Court for necessary reliefs. This Court cannot grant them any relief. For the same reasons the Special appeal filed by the owners is also liable to be allowed, because it is not the case where the direction for restoring the possession of the property to the tenants could have been issued.

14. For the reasons given above. Special Appeal is allowed. The impugned order dated 27-11-1995 passed by the learned Judge is set aside. Writ petition filed by the tenants is dismissed. Tenants will have liberty to approach Civil Court for appropriate relief if so advised. In view of the facts and circumstances of the case there shall be no order as to costs.

15. Order accordingly.